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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE TURNER,

Defendant and Appellant.

B158895

(Los Angeles County
Super. Ct. No. BA222413)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ruffo Espinosa, Judge. Affirmed.

John F. Guenther, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Susan D. Martynec and Lance E. Winters, Supervising Deputy Attorneys General,
for Plaintiff and Respondent.

Defendant and appellant, Robert Lee Turner, appeals from the judgment entered following his conviction, by jury trial, for possession of a controlled substance (Health & Saf. Code, § 11350). Sentenced to a term of probation for three years, Turner contends there was trial error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. Prosecution evidence.

On the afternoon of September 18, 2001, Los Angeles Police Officers Charles Geiger, Luz Bednarchik and Charles Baley were working undercover near MacArthur Park. Geiger was stationed at an observation post two or three stories off the ground. He had a clear view of the park, but he wasn't using binoculars. He saw a juvenile, Jeff R., take money from a man in exchange for a small object Jeff took out of his mouth. The man walked off and appeared to smoke the object Jeff had given him. Geiger concluded Jeff was selling rock cocaine.

Geiger then saw defendant Turner and Rico Nunez walk into the park. Turner sat down on a park bench. Nunez went over to Jeff and handed him money. Jeff gave Nunez an object from his mouth. Nunez returned to where Turner was sitting, and then the two of them walked off. Nunez appeared to break the object he had in his hand and give part of it to Turner. Geiger continued to watch Turner and Nunez until they passed out of sight, onto Carondelet Street.

Alerted by Geiger over the radio, Bednarchik and Baley drove up to Turner and Nunez. Bednarchik testified she got out of the car, approached Turner and identified herself as an officer. She noticed Turner's right hand was clenched in a fist against his leg. Turner quickly moved his fist backward and then forward. Bednarchik didn't see anything fall from his hand, but she saw him look down, lift his right foot and stomp on the ground. Bednarchik found some off-white objects resembling rock cocaine in wafer form on the ground where Turner's foot had

been. Chemical testing subsequently showed these objects contained cocaine base.

Baley testified he had followed Bednarchik out of the car. He did not see Turner move his hands, but he did see Turner move his foot in a side-to-side motion. He saw Bednarchik pick up an off-white solid substance from the area where Turner's foot had been. Baley searched Nunez and found cocaine base. When Turner was searched, he had a quarter on him, but no drug paraphernalia.

2. Defense evidence.

Turner testified he lived near MacArthur Park with a roommate. His roommate was expecting a caseworker, so Turner left the apartment to give them privacy. He visited some friends and then ran into Nunez, whom he knew by sight but not by name. They walked toward the park. Turner asked Nunez for a quarter so he could call his roommate to see if the caseworker had left. Nunez said he had to get change. They went into the park and Turner sat down at a bench. Nunez went over to some men and spoke with them. After a few minutes, he came back and gave Turner a quarter. Turner denied getting drugs from Nunez. Turner testified he was walking toward a phone booth when the police stopped him. He denied clenching his fist or making any motion with his arm or leg. The male officer took Turner away and spoke with him. When they returned, the female officer was on the ground saying she had found something. Turner denied dropping anything on the ground.

CONTENTION

The trial court erred by partially denying Turner's *Pitchess* discovery motion.

DISCUSSION

Turner contends the trial court erred because it denied his motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, as to Baley and Geiger. This claim is meritless.

In his *Pitchess* motion, Turner alleged discovery was appropriate because the officers' "assertions contained in the arrest report conflict dramatically with [Turner's] version" of what happened. Defense counsel's declaration stated Turner asked Nunez for "a quarter so he could call his roommate to see if it was okay to return home. [Nunez] handed Mr. Turner a quarter and that was the only object that was exchanged between them. [¶] Mr. Turner states that two L.A.P.D. officers approached them and identified themselves and ordered them to put their hands on their heads. [He] complied immediately. He saw the officers searching the ground in his vicinity, but nothing was found or recovered. [He] did not know why he was arrested until he was booked and told he was being charged with possession of a controlled substance. [He] was shocked as any 51 year old man with no prior drug arrests, much less convictions would be."

The trial court granted Turner's *Pitchess* motion in part, saying, "[I]n your declaration I don't really find a specific factual scenario regarding the officers, as such; however, if you take the declaration in conjunction with the police report that is attached I think that there may be enough as to Officer Bednarchik." The trial court subsequently made an in camera review of Bednarchik's records, finding nothing discoverable. We conclude the trial court did not err by denying the *Pitchess* motion as to Baley and Geiger.

We reviewed the history of *Pitchess* motions in *City of Los Angeles v. Superior Court* (2002) 96 Cal.App.4th 255, 259-260: " 'In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as "*Pitchess* motions" . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. The Penal Code provisions define "personnel records" (Pen. Code, § 832.8) and provide that such records are "confidential" and subject to discovery only pursuant to the procedures set forth in the Evidence Code. (Pen. Code, § 832.7.) Evidence Code sections 1043 and 1045 set out the procedures for discovery in detail. As here pertinent, section 1043, subdivision (a) requires a written motion and notice to the

governmental agency which has custody of the records sought, and subdivision (b) provides that such motion shall include, inter alia, “. . . (3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation”’ [Citation.] [¶] ‘A finding of “good cause” under [Evidence Code] section 1043, subdivision (b) is only the *first* hurdle in the discovery process. Once good cause for discovery has been established, section 1045 provides that the court shall then examine the information “in chambers” [and determine whether it should be released].’ [Citation.] The ‘relatively low threshold’ for discovery embodied in section 1043 requires a showing of good cause for discovery in two general categories: (1) the materiality of the information to the subject matter involved in the pending litigation, and (2) a reasonable belief that the governmental agency has access to the information.”

The good cause showing under Evidence Code section 1043, subdivision (b)(3), requires that a defendant provide a “specific factual scenario” establishing a “plausible factual foundation” for the allegations of police misconduct. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1138.) “Ultimately, whether a motion to discover police personnel records has been supported by an affidavit sufficient to show good cause and materiality of the requested information to the subject matter involved in the pending litigation is a factual determination made by the court in its sound discretion. [Citation.]” (*City of Los Angeles v. Superior Court, supra*, 96 Cal.App.4th at p. 260.)

As a general rule, discovery is permitted only as to those officers who are alleged to have played a part in the misconduct. (See Evid. Code, § 1047;¹ *Alt v. Superior Court* (1999) 74 Cal.App.4th 950, 952 [“Section 1047 applies if the request for discovery involves an issue concerning an arrest or a postarrest/prebooking incident or their functional equivalent; the section prohibits from discovery under sections 1043 and 1045, personnel records for peace officers who were not present during the arrest or who had no contact with the party seeking disclosure between the arrest and the booking.”].)

According to Geiger’s police report, he was not present when Bednarchik recovered the cocaine and arrested Turner. Geiger’s only connection to the arrest was his earlier observation of Nunez buying what appeared to be rock cocaine from Jeff, and then breaking off a piece for Turner. Geiger was not using binoculars and, in his police report, he asserted only that Nunez “opened his right hand and broke the *unknown* object and *appeared* to hand a piece of it to” Turner. (Italics added.) As for Geiger’s description of what happened after he lost sight of Turner and Nunez, Turner did not allege Geiger knowingly reported any false information.

Baley was present at the arrest and Turner does not specify what misconduct he committed. Although Geiger’s police report does not expressly state whose observations he relied on after he lost sight of Turner, the report makes it absolutely clear it was Bednarchik who found the drugs. Hence, it was a fair inference Geiger was reporting on Bednarchik’s observations, and Geiger’s preliminary hearing testimony confirms that his report’s description of how the cocaine was found came from Bednarchik. This was apparently why the trial court

¹ Evidence Code section 1047 provides: “Records of peace officers or custodial officers, as defined in Section 831.5 of the Penal Code, including supervisory officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure.”

limited discovery to Bednarchik, and we cannot say this decision was an abuse of discretion.

Turner relies on *People v. Gill* (1997) 60 Cal.App.4th 743, which held the trial court abused its discretion by finding an insufficient good cause showing to warrant *Pitchess* discovery. After Gill was arrested for cocaine possession, he claimed the drugs had been planted on him. His attorney's *Pitchess* declaration stated “ ‘[i]t will be a defense in this matter that the alleged contraband was placed on [appellant] by [Officer Hunt] to cover up for his use of excessive force.’ ” (*Id.* at p. 750.)

But *Gill* does not help Turner. First, Gill alleged Hunt planted evidence on him. Turner did not allege Baley planted the cocaine, and the police report indicates only that it was Bednarchik who found the cocaine. Second, Gill did not ask for discovery as to Hunt's partner, Solarzano, who had come running over to help with the arrest after Hunt found cocaine.² Hence, Bednarchik was in the same role as Hunt, while Baley was in the same role as Solarzano. Baley's connection to the actual discovery of the cocaine was so indirect the trial court did not abuse its discretion by denying the *Pitchess* motion as to him.

² “Officer Hunt found nothing in appellant's mouth and asked if he could check appellant's pockets for any narcotics. Appellant answered ‘check, check,’ and Officer Hunt pulled open the pocket of the large military type jacket appellant was wearing and observed a cigarette lighter and a small object which Officer Hunt believed to be rock cocaine. Officer Hunt decided to arrest appellant and placed him in a standard twist lock. As he did that, appellant reached across with his right hand into his left pocket and began to remove some items from his pocket. Appellant managed to throw two small objects to the ground and attempt to step on them. About this time, Officer Solarzano came to the location and appellant was taken to the ground and handcuffed. Officer Hunt then recovered the items tossed to the ground. (The items recovered from the ground and from appellant's pocket were analyzed and found to contain cocaine.)” (*People v. Gill, supra*, 60 Cal.App.4th at p. 746, fn. omitted.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.